In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-980

GAETANO DOMINICK VASTOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner questions whether the unsuccessful efforts to induce fear of economic injury is sufficient to support a Hobbs Act attempted extortion prosecution and whether the government improperly shifted its theory of the case at trial.

After a five day jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of an attempted extortion in violation of 18 U.S.C. 1951 and was sentenced to two and one-half years' imprisonment. The scheme involved an attempt to extort $500,000 from a national carpet manufacturer on the threat that, if the company did not "pay off," petitioner would see to it that its carpets could not be

installed in the New York City area.[1] The court of appeals summarily affirmed from the bench. 468 F. 2d 632.

1. Petitioner argues first that the evidence established an attempt to extort funds by the threat of economic injury, which did not succeed because of his failure actually to "instill fear" in his victim. Such conduct, petitioner claims, does not come within the meaning of 18 U.S.C. 1951, which makes it an offense to attempt to extort property "by wrongful use of actual or threatened force, violence, or fear * * *." This argument, which petitioner candidly acknowledges has been generally rejected by the courts that have considered it (Pet. 16)[2], is contrary to the plain language of the Hobbs Act as well as to the traditional "criminal law principle" (Pet. 16, n. 6) that a criminal attempt to extort can be committed even if the victim is not actually put in fear. Petitioner's contrary argument was properly rejected by the court of appeals, and does not warrant further review.

2. Petitioner's claim that the indictment was illegally amended when the United States Attorney allegedly shifted his theory of the case "from one involving an extortion by instilling actual fear of economic injury" to one "involving an attempted extortion by unsuccessfully attempting to instill such fear" (Pet. 2-3) lacks foundation in the record. The indictment expressly alleged that petitioner and his accomplices "did obstruct, delay and

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[1]There can be no contention that the demands in this case were made in the context of a labor-management dispute seeking higher wages for services desired by the employer. Thus the recent decision in *United States* v. *Enmons*, No. 71-1193, decided February 22, 1973, is not applicable.

[2]*United States* v. *Pranno*, 385 F. 2d 387, 389 (C.A. 7), certiorari denied, 390 U.S. 944; *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 393; See, also, *United States* v. *Green*, 350 U.S. 415, 417, 421.

affect interstate commerce * * * by extortion, in that they requested, demanded and *attempted* to obtain amounts of money in excess of $500,000 * * * by wrongful use of actual *or threatened force, violence and fear*"[3] (Pet. 4-5; emphasis added). The proof upon which petitioner was convicted clearly supports "the indictment which was found by the grand jury" (*Ex parte Bain*, 121 U.S. 1, 9-10)[4].

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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[3]The indictment then goes on to allege with particularity the "threat" of economic coercion employed by petitioner and his accomplices.

[4]Petitioner's vague and unsubstantiated claim that he was deprived of a "fair opportunity to develop his defense, and to cross-examine the Government witnesses" (Pet. 18) is without merit. The indictment specified in great particularity the nature of the threats employed (Pet. 4-5). Whether fear was actually instilled in petitioner's victims was not under any circumstances a defense to the crime, and petitioner had an ample opportunity—if he so desired—to recall any witness for further cross-examination.